Manitowoc Ice, Inc. *and* International Association of Machinists and Aerospace Workers, Clipper City Lodge No. 516, AFL–CIO. Case 30–CA–16270–1

July 29, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 30, 2003, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

Introduction

This case involves unilateral changes made by the Respondent to its profit-sharing plan. The General Counsel and the Union contend that the Respondent's action was unlawful because the changes were made without first bargaining with the Union. The Respondent asserts that the Union acquiesced in the Respondent's repeated position that it retained sole discretion to amend the plan, and thereby waived its asserted right to challenge the Respondent's unilateral changes. For the reasons set forth below, we agree with the Respondent that, by failing to dispute the Respondent's assertions that it retained unlimited discretion with respect to the plan, the Union bargained away its asserted right to challenge the Respondent's changes. Accordingly, we conclude that the Respondent's changes to the profit-sharing plan did not violate Section 8(a)(5) and (1). We further agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) through its alleged delay in providing the Union with requested information.[3]

Factual Background

The facts, as set forth more fully in the judge's decision, are as follows.

Respondent is a corporate subsidy of the Manitowoc Company, Inc. (Manitowoc). In 1960, Manitowoc unilaterally created separate profit-sharing plans for the represented and nonrepresented employees of all its subsidiaries, including the Respondent. Under the plans, the contributions for the employees of each subsidiary were directly linked to the profitability of the subsidiary for which they worked. The Respondent has historically been one of the most profitable subsidiaries of Manitowoc.

Over the years, Manitowoc made several changes to the profit-sharing plans of its subsidiaries, including changes to eligibility requirements and contribution formulas. The Respondent never gave notice to or bargained with the Union over those changes, and the Union never complained to the Respondent or filed charges with the Board in response to any of those changes.

In November 2000, Manitowoc, having decided that retirement benefits for all of the subsidiaries should be made more uniform, revised the profit-sharing plan for the Respondent's nonrepresented employees. Under the plan revisions, contribution levels were linked to the profitability of Manitowoc as a whole, not to the profitability of the Respondent.

In February 2001, the Union and the Respondent entered into negotiations for a new collective-bargaining agreement. At the first bargaining session, the Union, aware of the changes that had been made to the profit-sharing plan of the Respondent's nonrepresented em-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's credibility findings regarding Garber's testimony, we do not rely on the judge's discussion of Garber's use of the phrase "a negotiated item" instead of the phrase "a negotiable item" during his testimony.

[2] Respondent filed a Motion to Strike General Counsel's Answering Brief to Respondent's Cross-Exceptions, and counsel for the General Counsel filed a Motion to Require Conformance of Respondent's Reply Brief. Respondent's motion is denied as the General Counsel's Answering Brief to Cross-Exceptions substantially complies with the Board's Rules. In addition, we deny the General Counsel's Motion to Require Conformance. The Respondent asserts, without rebuttal, that its failure to conform its Reply Brief to the Board's Rules was because it relied upon the default setting of its word-processing program. In addition, it appears that, with a correct setting, the brief would have exceeded the page limit only by a page or two. In view of the unintentional nature of the error, and its limited impact, we will not further delay this case by requiring conformance.

[3] As the judge found, the oral information requests of the Union were largely rhetorical in nature and, furthermore, the Union had independent access to most of the general information requested. In addition, as the judge notes, the General Counsel did not contest the timeliness or completeness of the Respondent's provision of plan documents in response to the Union's request for information about the profit-sharing plan, nor did the General Counsel question the adequacy of the Respondent's February 7 response to the Union's oral inquiries.

ployees, proposed that the Respondent agree to "guarantee the current profit-sharing plan for the length of the agreement." In response, the Respondent stated that it had always maintained a right to make changes to the profit-sharing plan and that it intended to maintain that right in the future. The Union did not challenge the Respondent's statement.

At several subsequent bargaining sessions, the Union reasserted its proposal that the Company guarantee the profit-sharing plan, and, each time, the Respondent responded that the profit-sharing plan was not negotiable and would not be included in any collective-bargaining agreement. The Union did not contradict or challenge the Respondent's assertions, nor did the Union file any charges with the Board alleging that the Respondent, by maintaining that the profit-sharing plan was not subject to negotiations, was failing to bargain in good faith.

On August 15, 2001, the parties reached agreement. The resulting contract did not contain any specific reference to the profit-sharing plan, but it did contain a management-rights clause and a zipper clause.[4] The change involved herein occurred on February 22, 2002.

The Judge's Decision

The judge concluded, inter alia, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally changing its profit-sharing plan without first bargaining with the Union. We agree with the judge, but apply a different legal analysis than that set forth in his decision.

Analysis

In finding that the Respondent was not required to bargain with the Union prior to making changes to the profit-sharing plan, the judge applied a traditional waiver analysis. Specifically, the judge found that the issue of the profit-sharing plan was "fully discussed and consciously explored" during negotiations and that the Union "consciously yielded" its interest in bargaining over any changes to the profit-sharing plan.

We analyze the matter somewhat differently, but we reach the same result. The Board has long recognized that principles of equitable estoppel will preclude a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject. See, e.g., *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961). "Such an estoppel may of course result even though the party estopped . . . did not intend to lose or forego its existing rights or did not consciously agree" that the other party was free to make unilateral changes. Id.

Consistent with these principles, the Board in *Speidel Corp.*, 120 NLRB 733 (1958), found lawful the employer's unilateral discontinuation of a longtime Easter bonus for unit employees 4 months after the parties had signed a new contract that, like those before it, was silent on the subject of bonuses. During contract negotiations, the employer rejected a "Maintenance of Privileges" clause proposed by the union and told the union that it was doing so because it wanted to avoid making continuation of the bonus a contractual obligation. The union did not dispute the employer's position or thereafter press for acceptance of the proposed clause. As the Board recognized, the employer

> made it clear to the Union that it understood that the proposed 'Maintenance of Privileges' clause covered bonuses, and that it was adhering to its past position that bonuses were matters of 'management prerogative.' In the face of the Respondent's bargaining position, the Union's complete silence, and its failure at any time thereafter to contradict the Respondent's interpretation of the clause, must be taken to mean that the Union acquiesced in the Respondent's understanding.

Speidel Corp., 120 NLRB at 741. On these facts, the Board held that there was a clear understanding between the parties that the subject of bonuses would remain a management prerogative and that the union had, therefore, "bargained away" its interest in the matter of bonuses. Id.

In the *Speidel* case, the Board cited with approval the court's opinion in *NLRB v. Nash-Finch Co.*, 211 F.2d 622 (8th Cir. 1954), wherein the court rejected as "untenable" the position that the employer was required to maintain insurance benefits and a Christmas bonus for unit employees after negotiating a collective-bargaining agreement that did not provide for those benefits and rejecting a maintenance of standards clause proposed by the union. The court stated that the employer could

> not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for. 'And it is clear that [the] Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.' . . . It seems to us that what the Board has done, under the guise of remedying unfair labor practices, is to attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to ob-

[4] In light of our disposition of this case, we find it unnecessary to reach the issue whether the management-rights clause and zipper clause operated as a waiver of the Union's right to bargain regarding the profit-sharing plan.

> tain for them as a result of collective bargaining with the respondent on their behalf.

Id. at 627 (internal citation and ellipses omitted).

Applying these principles to the facts of this case, we find that the Union has acquiesced in the Respondent's position that the terms of the profit-sharing plan are a management prerogative and that, therefore, it is now equitably estopped from asserting otherwise. As noted above, the Respondent unilaterally created and, on several occasions, modified the plan without giving the Union notice or an opportunity to bargain, and the Union acquiesced in all of these unilateral changes. Furthermore, during negotiations for the 2001 agreement, the Respondent rejected the Union's proposal that the profit-sharing plan be guaranteed for the life of the contract and explained that it was doing so because the plan was a nonnegotiable management prerogative. The Union reasserted its proposal a few times before dropping it, but did not challenge the Respondent's position and ultimately entered into a new collective-bargaining agreement that did not contain any reference to the profit-sharing plan.

On these facts, we find that there was a "clear understanding" that the profit-sharing plan would remain a management prerogative, and that the Union, by its conduct set forth above, "bargained away" its interest in the plan. See *Tucker Steel Corp.*, 134 NLRB at 333; *Speidel Corp.*, 120 NLRB at 741. By challenging the Respondent's unilateral changes to the plan, after abandoning its effort in collective-bargaining to make the plan a contractual benefit, the Union is, in effect, attempting to deprive the Respondent of the benefit of its bargain. Accordingly, because the Respondent has done "no more and no less for its union employees than its collective bargaining agreement with them called for," we decline to find that its conduct constituted an unfair labor practice.[5] See *NLRB v. Nash-Finch Co.*, 211 F.2d at 627.[6]

[5] Chairman Battista agrees that the Respondent was equitably estopped from protesting the unilateral change of the profit-sharing plan in February 2002. However, he also relies upon the judge's finding that the Union "consciously yielded" its position on profit sharing, and it did so during the bargaining for the 2001 contract. During those negotiations, the Union sought a clause that would forbid unilateral changes in profit sharing during the life of the contract. The Respondent resisted, based on its asserted right to make such changes. The Union withdrew the proposal. In these circumstances, the change of February 2002 was privileged.

[6] Because we have dismissed this complaint allegation for the reasons stated above, we find it unnecessary to address the Respondent's contention that the complaint also should be dismissed on a "contract coverage" theory. See *Honeywell International, Inc. v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) (explaining contract coverage doctrine).

Our concurring colleague agrees that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally modifying its profit-sharing plan in 2002, essentially for the reasons stated above. Our colleague asserts, however, that because the Union has now challenged the Respondent's "supposed management prerogative," the Respondent is now "on notice that it acts unilaterally at its peril."

The question of whether the Respondent has the right to make further unilateral changes to the profit-sharing plan is not before us. Accordingly, there is no need to finally resolve that issue here. Our decision to not respond to our colleague is not to be taken as an implied agreement with her. Indeed, we have strong reservations about her view.[7]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 29, 2005

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring in part and dissenting in part.

I write separately on two issues: First, I agree with the majority that, in the unusual circumstances presented, the Respondent did not violate the Act by unilaterally changing its profit-sharing plan. My colleagues reach back 40 years and more to find factually analogous cases, where equitable estoppel principles were applied—as opposed to the well-established waiver doctrine applied by the judge here. While I have misgivings about appearing to endorse yet another analytical approach to unilateral-change cases,[1] I conclude that the Respondent was free to make the change at issue. But it also seems to me that

[7] Without deciding the issue, Chairman Battista also notes that, given the Union's "conscious yielding" during the negotiations for the 2002 contract on the issue of the Respondent's right to make changes to the profit-sharing plan, it would appear that the matter is resolved, in favor of the right to change, for the life of that contract.

[1] The "clear and unmistakable" waiver standard has long been established in Board law. See, e.g., *C & C Plywood Corp.*, 148 NLRB 414 (1964), enf. denied, 351 F.2d 224 (9th Cir. 1965), rev'd & remanded for enforcement, 385 U.S. 421 (1967). As the majority's decision implicitly acknowledges (see fn. 1), the Board also has been urged to adopt the so-called "contract coverage" doctrine, favored by some appellate courts.

future changes would be a different story. Second, in contrast to the majority and the judge, I would find that the Respondent violated Section 8(a)(5) by its delay in providing the Union with requested information.

I.

Profit-sharing plans are indisputably a mandatory subject of bargaining under the Act.[2] Here, the Respondent employer clearly seems to have violated Section 8(a)(5) by refusing to bargain over its profit-sharing plan during contract negotiations with the Union, despite the Union's repeated efforts. But the Union failed to file a timely unfair labor practice charge over the Respondent's refusal to bargain during negotiations. A charge was filed, rather, only after the Respondent unilaterally changed the plan, without giving the Union notice and an opportunity to bargain.

The judge found no violation, concluding that the Union's conduct during negotiations—in his words, it "consciously yielded to the Respondent's insistence that the profit-sharing plan would continue to be a management prerogative"—amounted to a clear and unmistakable waiver of its right to bargain.

My colleagues reach the same result by a somewhat different route. They find that the "Union has acquiesced in the Respondent's position that the terms of the profit-sharing plan are a management prerogative, and is now equitably estopped from asserting otherwise." The majority cites: (1) the Union's acquiescence in prior unilateral changes to the profit-sharing plan; (2) the Respondent's rejection (asserting that the plan was nonnegotiable management prerogative) of union proposals that the profit-sharing plan be guaranteed for the life of the new contract; and (3) the Union's failure to challenge the Respondent's position and its agreement to a new contract that did not refer to the plan. As a result, say my colleagues, the Union "'bargained away' its interest in the plan."

In my view, while a "clear and unmistakable" waiver cannot be established,[3] it is nevertheless fair to conclude that the Union is estopped from challenging the specific change at issue here. Give the Union's failure to file a charge during the negotiations, and its apparent acquiescence then in the (mistaken) view that the plan was a management prerogative, the Respondent was entitled to believe that it could make the change unilaterally.[4] But that one-time reliance cannot provide a *continuing* basis on which to act unilaterally with respect to the profit-sharing plan, which remains a mandatory subject of bargaining under the Act.[5] The Union has now challenged the Respondent's supposed management prerogative, and the Respondent is thus on notice that it acts unilaterally at its own peril. Notably, no language in the current agreement affirmatively authorizes the Respondent to act unilaterally with respect to the plan. Cf. *T.T.P. Corp.*, 190 NLRB 240 (1971) (no waiver of right to bargain over termination of unilaterally-established pension plan, despite failure of collective-bargaining agreements to refer to plan).

II.

Turning to the information-request issue, I would find that the Respondent violated Section 8(a)(5) by its delay in providing the Union with the requested information.

Immediately following the announcement of changes to the unit employees' profit-sharing plan on July 22, 2002, the Union requested information concerning those changes. On August 7, 2002, the Union filed a grievance over the unilateral changes. Thereafter, the Union made additional requests for information, including a request for the latest version of the plan documents. Although those documents were requested on October 31, 2002, the Respondent did not supply those documents until December 3, 2002. Even then, the Respondent did not fully respond to the Union's questions until early 2003.

An employer must supply relevant information in a timely fashion. *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989). Contrary to the judge, the issue here is not whether the Union was prejudiced by the delayed receipt of the requested information, but whether that relevant information was received in a timely manner. It

[2] See, e.g., *Dickten & Masch Mfg. Co.*, 129 NLRB 112 (1960). See also *Como Plastics*, 143 NLRB 151, 155–156 (1963) (employer violated Section 8(a)(1) by threatening to refuse to bargain with union over profit-sharing plan).

[3] The Union did not remain silent in the face of the Respondent's asserted management prerogative to make unilateral changes to the profit-sharing plan. During the parties' negotiations, the Union raised the issue of profit-sharing on six separate occasions. On five out of six occasions, the Union raised the issue after the Respondent's initial statement that profit sharing was nonnegotiable. Simply because the Union was ultimately unsuccessful in pressing for inclusion of its profit-sharing plan proposal in the parties' contract does not mean that it agreed that the profit-sharing plan was a nonnegotiable issue. See *Leeds & Northrup Co.*, 162 NLRB 987, 992–993 (1967), enfd. 391 F.2d 874 (3d Cir. 1968); *Press Co.*, 121 NLRB 976 (1958). Nor does the Union's acquiescence to prior unilateral changes in the profit-sharing plan support a waiver finding. See, e.g., *Owens-Corning Fiberglass*, 282 NLRB 609 (1987).

[4] Arguably, the Respondent's position in negotiations deprives it of clean hands and weighs against permitting it to benefit from an equitable doctrine. See *Diversified Bank Installations, Inc.*, 324 NLRB 457, 461, 465 (1997). But the Union's own failure to file an unfair labor practice charge, challenging the Respondent's refusal to negotiate, means that the Respondent's apparently unlawful conduct is not before us.

[5] See, e.g., *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993); *Exxon Research & Engineering Co.*, 317 NLRB 675, 685–686 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996).

was not. Although the Union's grievance was filed back in August, and the Union requested copies of the plan documents, it took the Respondent almost 2 months to meet the Union's request. Indeed, at the meetings over the Union's grievance, the Respondent's representatives were unable to answer the Union's questions, making such meetings unproductive. Nor was the Union's right to the information defeated merely because it could have acquired the needed information through an independent course of action. *Kroger Co.*, 226 NLRB 512, 513 (1976). Accordingly, I would reverse the judge's dismissal of this complaint allegation.

Dated, Washington, D.C. July 29, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Andrew S. Gollin and *Joyce Seiser, Esqs.*, for the General Counsel.

Clifford B. Buelow and *Joel S. Aziere, Esqs.*, of Milwaukee, Wisconsin, for the Respondent.

Cristina Munoz, Representative, of Westchester, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Milwaukee, Wisconsin, on September 30 through October 2, 2003. On December 5, 2002, in Case 30–CA–16270–1, International Association of Machinists and Aerospace Workers, Clipper City Lodge No. 516, AFL–CIO (the Union) filed a charge under Section 10(b) of the Act alleging that, in violation of Section 8(a)(5) of the Act, Manitowoc Ice, Inc. (the Respondent), had failed and refused to bargain with the Union as the statutory representative of certain of the Respondent's employees by engaging in unilateral actions. On February 18, 2003, the Union amended the charge to allege that, also in violation of Section 8(a)(5), the Respondent had withheld from the Union information necessary for it to function as the collective-bargaining representative of the same employees. Thereafter, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had violated Section 8(a)(5) by unilaterally making changes to the profit-sharing plan of its employees who are represented by the Union and by subsequently refusing to furnish the Union with information about those changes. The Respondent duly filed an answer to the complaint admitting that this matter was properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[1] and upon an exhibit submitted posthearing,[2] and after consideration of the briefs that have been filed, I enter the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

As it admits, at all material times the Respondent has been a corporation with an office and place of business in Manitowoc, Wisconsin, where it has been engaged in the business of manufacturing commercial ice machines and storage bins. During the year ending December 31, 2002, the Respondent sold and shipped goods and materials valued in excess of $50,000 directly to purchasers located at points outside Wisconsin. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background and basic contentions

The Respondent is a corporate subsidiary of the Manitowoc Company, Inc. The Manitowoc Company has about 40 other corporate subsidiaries throughout the world, including several in various other states of the United States and several in other countries, including France, Germany, and China. The Manitowoc Company divides its subsidiaries into 3 groups: Manitowoc Crane Group, Manitowoc Foodservice (as one word) Group, and Manitowoc Marine Group. The Respondent is one of the 12 members of the Manitowoc Company's Foodservice Group. A member of the Manitowoc Company's Crane Group is Manitowoc Cranes, Inc. (Manitowoc Cranes), and a member of the Manitowoc Company's Marine Group is Bay Shipbuilding Corporation (Bay Ship). The Respondent and Manitowoc Cranes are located in Manitowoc, Wisconsin; Bay Ship is located in Sturgeon Bay, Wisconsin. The Respondent, Manitowoc Cranes and Bay Ship are sometimes referred to as the Manitowoc Company's "old companies" because they (or their corporate predecessors) preexisted all other of the subsidiaries.

From at least the 1950s, the Union has represented all of the Respondent's production and maintenance employees in two separate units. The Union represents about 277 employees in a

[1] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate, without ellipses, words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked. . . ." All bracketed words have been inserted by me. In quotations, I have replaced "profit sharing" with "profit-sharing" and "Company wide" with "Company-wide."

[2] R. Exh. 51, certain proposals from negotiations between the parties, submitted posthearing with the consent of the General Counsel and the Charging Party, is hereby received. The General Counsel's letter of October 16, 2003, stating his position on R. Exh. 51 is received as ALJ's exh. 1; the Respondent's reply letter, dated October 27, 2003, is received as ALJ's exh. 2.

"production workers' unit," and it represents about 10 employees in a "maintenance mechanics' unit." The Respondent and the Union have been parties to a great number of collective-bargaining contracts over the years. Contracts for the two units that were negotiated in 1997 expired on July 1, 2001. The parties bargained for successor agreements from February 8, 2001, until August 15, 2001 (the 2001 negotiations). On that date the parties entered contracts effective from August 1, 2001, until March 31, 2005 (the 2001 contract).[3]

The Respondent employs approximately 100 other employees (hourly and salaried) who are not represented by any labor organization (the nonrepresented employees). The Union also represents some of the production and maintenance employees of Manitowoc Cranes. The record does not disclose how many employees the Union represents at Manitowoc Cranes, but, whatever the number, several other unions separately represent some of the remaining employees of Manitowoc Cranes in other units. The Union does not represent any employees at Bay Ship; some of the employees there are represented by several other unions in separate units.

The International Association of Machinists maintains a pension plan in which many employers participate. Neither the Manitowoc Company nor the Respondent, however, is such an employer. Over the years, however, the Manitowoc Company has provided benefits upon which retired employees of its subsidiaries could draw. In 1960, the Manitowoc Company created separate profit-sharing plans for the benefit of represented and unrepresented employees of all of its then-subsidiaries including the Respondent, Manitowoc Cranes, and Bay Ship.[4] Also, in 1997, the Manitowoc Company created Section 401(k) plans for the represented and nonrepresented employees of the Respondent, Manitowoc Cranes, and Bay Ship. The Manitowoc Company and its subsidiaries created these benefits unilaterally; that is, they did not negotiate with any union before creating and implementing the plans for the represented employees. Specifically, the Respondent did not negotiate with the Union before creating and implementing the profit-sharing plans and the Section 401(k) plans, even though the employees who were (and are) represented by the Union became eligible to participate (and did participate) in those benefits. In none of the contracts between the Respondent and the Union that has been entered since 1960 has a profit-sharing plan (or a Section 401(k) plan) been mentioned. Over the years, until the events of this case, the Manitowoc Company made several changes to the profit-sharing plans of its subsidiaries. Joint Exhibit 7 reflects such changes by amendments to the profit-sharing plan that were made in 1961, 1963, 1973, 1984, 1989, and 1994; those changes involved such matters as eligibility and contribution formulas. The Respondent never gave notice to, or bargained with, the Union about the changes. Until the events of this case, the Union never complained to the Respondent or filed charges with the Board about the Respondent's unilateral changes in the profit-sharing plan (or changes in the Section 401(k) plan).

For each year from the inception of the profit-sharing plans until the events of this case, the represented and nonrepresented employees of the Respondent, Manitowoc Cranes, and Bay Ship received contributions to their profit-sharing accounts at the rate of 15 percent of their annual earnings, the maximum allowable under IRS regulations. The maximum was reached each year, in part, because contributions were calculated on a subsidiary-by-subsidiary basis. The Respondent, Manitowoc Cranes, and Bay Ship are profitable subsidiaries of the Manitowoc Company, and the Respondent has historically been the most profitable of all.

In 2000, the Manitowoc Company's board of directors decided that retirement benefits for all of the subsidiaries should be essentially the same. In November 2000, the Respondent announced that, effective January 1, 2001, changes to the profit-sharing plan that covered the nonrepresented employees of the Respondent, Manitowoc Cranes, and Bay Ship would be based on the combined profits of all subsidiaries of the Manitowoc Company, worldwide, and not just the profits of the subsidiaries for which the employees worked. After the announcement, the Respondent held meetings with the nonrepresented employees to explain the workings of their profit-sharing plan as it was about to be modified.

No change was made to the profit-sharing plan of the represented employees during 2001, but on February 22, 2002, the Manitowoc Company's board of directors approved a document entitled "Resolutions of the Board of Directors Amending the Hourly[5] Employees' Deferred Profit-Sharing Plans of Manitowoc Ice, Inc., Manitowoc Cranes, Inc., and Bay Shipbuilding Corporation."[6] The resolution changed, retroactive to January 1, 2002, the method of computing contributions to the represented employees' profit-sharing accounts. Consistent with what had been done to the profit-sharing plan of the nonrepresented employees, the 2002 change in the profit-sharing plan established that computations for the represented employees' profit-sharing plan would be made on the basis of the combined earnings of all of the Manitowoc Company's subsidiaries, worldwide, rather than on the basis of the earnings of each company.[7] As a result of the changing of the basis for calculating contributions (and, according to the Respondent, as a result of a downturn in business after September 11, 2001), for the year 2002, the employees of the Respondent who are represented by the Union received contributions to their profit-sharing accounts at the rate of 1.29 percent of their annual earnings. The Respondent held no meetings to explain to the represented employees the changes that had been made to their profit-sharing plan.

[3] The two 2001 contracts, one each for the production workers' unit and the maintenance mechanics' unit, will be referred to in the singular because they are identical in all significant respects (except, of course, the unit descriptions).

[4] At the time, the Respondent had a different corporate name.

[5] In this instance, "hourly" was the Manitowoc Company's terminology for union-represented employees.

[6] R. Exh. 46(gg).

[7] Or, as stated by the Respondent on brief, p. 8: "This change meant that, rather than determining the contribution rate for each of the old companies based upon the earnings of that subsidiary, the contribution rate for all three companies would be the same, based upon the overall consolidated earnings of the Manitowoc Company and its subsidiaries."

The Respondent admits that it did not notify and bargain with the Union before it implemented the change in the method of computing profit-sharing contributions pursuant to the Manitowoc Company's February 22, 2002 resolution.[8] The complaint alleges that, by the Respondent's unilaterally changing the method of computing its contributions to the profit-sharing accounts of its employees who are represented by the Union, with the resultant diminutions in those contributions,[9] the Respondent violated Section 8(a)(5). The General Counsel further alleges that the Respondent violated Section 8(a)(5) by delaying from August 2002 until February 7, 2003, the furnishing of requested information about its changes to the represented employee's profit-sharing plan.[10]

The Respondent first contends that the complaint's allegations that it made unlawful unilateral changes to the profit-sharing plan are not supported by a charge that was filed within the 6-month limitations period of Section 10(b) of the Act.[11] Specifically, the Respondent notes that the charge was not filed until December 5, 2002, but it had taken its unilateral action almost 10 months before that date, on February 22. The Respondent further contends it notified the Union beforehand, by certified mail, on February 13, that it would take the action on February 22. The General Counsel, however, replies that the Union did not receive the certified-mail notification and that the Union did not learn of the changes to the profit-sharing plan until it came into possession of a July 22, 2002 letter by which the Respondent notified the represented employees of the changes. The General Counsel contends, therefore, that the limitations period of Section 10(b) did not begin to run against the Union until some time in late July.

The Respondent further contends that, even if the allegation of unlawful unilateral changes to the profit-sharing plan is supported by a timely charge, the Union waived any right to compel it to bargain about the changes by (1) its historical failures to object to unilateral changes in the profit-sharing plan that the Respondent had made over the years (including the establishment of the plan itself), (2) its entries into contracts that do not mention profit-sharing, including specifically the 2001 contract, (3) its conduct during the 2001 negotiations, and (4) its agreement to zipper and management rights clauses in the 2001 contract.[12]

In denying that it unlawfully delayed furnishing information about changes in the profit-sharing plan, the Respondent contends that the Union did not make its requests for information in writing and that the Union did not direct its oral requests to officials of the Manitowoc Company, which was the sponsor of the profit-sharing plan. The Respondent further contends that the Union actually possessed the information long before February 7, 2003.

2. The 2001 contract negotiations

During the 2001 negotiations, Russell Krings, business agent of District 10 of the IAM, was the chief union spokesman. Steve Garber is a production employee of the Respondent and chairman of the Union's internal "bargaining and shop" committee (which committee bargains with the Respondent in negotiations of contracts and which also processes grievances for both the production workers' and maintenance mechanics' units). Garber assisted Krings in the negotiations and stated the Union's position many times. Gary Dworak, also a production employee, is the Union's vice president, and during negotiations he was a member of the Union's negotiating team; he also stated the Union's position many times. Thomas Musial, who is the Manitowoc Company's senior vice president of human resources and administration, was the Respondent's chief spokesman at the 2001 negotiations. Doug Cayemburg, the Respondent's manufacturing superintendent, assisted Musial and served as the Respondent's note-taker.

Even though Krings was the Union's chief negotiator, the General Counsel did not ask Krings about what happened concerning profit-sharing during the 2001 negotiations, or about what happened before those negotiations began. Dworak, however, testified that: "Well, we had heard prior to 2001 negotiations that the profit-sharing plan had changed for the non-bargaining-unit people and the committee and its members felt that we needed to ensure that profit-sharing, or some type of retirement plan, was in place for our members." Therefore, the Union decided that it would attempt in the 2001 negotiations to have profit-sharing become a term of a collective-bargaining agreement for the first time.

During the February 8 bargaining session, the Union proposed that: "The Company will agree to guarantee the current profit-sharing plan for the length of this agreement. The Company shall also match the first 3% of any Union employee's 401(k) contribution."[13] As noted, neither the profit-sharing plan nor a Section 401(k) plan had been mentioned in prior contracts between the parties. Garber testified on direct examination that the Union made these proposals because he and other employees had heard that the Respondent had recently

[8] The Respondent further admits that it did not notify the Union that it was contemplating changes in the profit-sharing plan, even though the Manitowoc Company's board of directors had begun deliberating the issue in 2000, and even though the parties engaged in contract negotiations from February 8 through July 15, 2001, and even though they had many other contacts, or opportunities for contacts, through January 2002.

[9] Two of the General Counsel's employee witnesses testified that for 2001, when the rate was 15 percent, they received employer contributions to their profit-sharing accounts of about $6,000. For 2002, when the rate was 1.29 percent, they received about $600.

[10] Although the complaint alleges a continuing refusal to furnish information, the General Counsel concedes on brief, as he did in his opening statement, that the Respondent furnished the requested information on February 7, 2003.

[11] Section 10(b) provides in pertinent part that ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

[12] The Respondent further relies on certain testimony that, during negotiations prior to 2001, previous union agents conceded that the Respondent had the right to make unilateral changes in the profit-sharing plan. That testimony was not rebutted, but I have found it unnecessary to rely upon it.

[13] The Union made this and other such proposals for both the production workers' unit and the maintenance mechanics' unit; therefore, I shall refer to the proposals in the singular.

changed the profit-sharing plan of the nonrepresented employees and "there was a little bit of nervousness out of our membership." On cross-examination Garber admitted that he knew before negotiations began that the Respondent had changed the profit-sharing plan of the nonrepresented employees to a basis of the earnings of the Manitowoc Company,[14] and Garber admitted that the Union's bargaining committee knew that the non-represented employees were "not happy" about the change.

To the Union's February 8 proposal that the Respondent guarantee the profit-sharing plan for the duration of the 2001 contract, Musial replied that the Respondent had always maintained a right to make changes in the profit-sharing plan and that it intended to maintain that right in the future.

Garber testified that Musial stated that profit-sharing was "not a negotiable item" and that Krings responded "that we thought that it was a negotiated [sic] item." Musial and Cayemburg denied that anyone on the Union's bargaining committee ever claimed that profit-sharing was negotiable. Again, although Krings was the Union's chief negotiator, the General Counsel did not ask Krings, himself, to testify about what he did and did not say during the 2001 negotiations. Rather than ask Krings to corroborate Garber's testimony that Krings had claimed that profit-sharing was negotiable, the General Counsel called upon Dworak. Dworak, however, testified that it was Garber (not Krings) who stated that profit-sharing was negotiable. I credit Musial and Cayemburg and find that during the 2001 negotiations neither Krings nor any other member of the Union's bargaining committee expressly challenged Musial's statements that profit-sharing was not negotiable.

Musial further testified that on February 8, Garber replied only that, if the Respondent was not going to agree to profit-sharing being in the 2001 contract, the money could be put into the IAM pension plan. Garber flatly denied mentioning the IAM pension plan at the February 8 meeting, even though he is squarely contradicted by the testimony and notes of Dworak. Garber acknowledged making a proposal for the IAM pension plan later in negotiations and, of itself, the point of when he first did so is not of great import. The conflict, however, is a good demonstration of why I found Garber to be an unreliable witness. Also, Garber was evasive at many points on cross-examination, and he claimed lack of memory too often to have much confidence in his testimony where it conflicts with that of the Respondent's witnesses. In making my findings of fact, therefore, I have usually credited the Respondent's witnesses over Garber, even though Garber was usually supported by Dworak.[15]

During a February 22 bargaining session, Garber again stated that the Union wanted a guarantee of the profit-sharing plan in the 2001 contract. Musial replied again that the Respondent intended to retain all rights to change the plan. As Cayemburg credibly testified, Garber replied, "We understand that. [We would] like to know where the Company is going with profit-sharing so we can present our pension plan."

During a February 23 bargaining session, the Union proposed: "The Company shall match the first 3 percent of any union employee's 401(k) contribution. The Company will also contribute $3.00 per hour to the bargaining unit employee's IAM pension fund." The Union's proposal made no reference to profit-sharing. Garber testified that the Union made the proposal for the IAM pension plan in lieu of a profit-sharing provision for the 2001 contract because: "They didn't seem to be interested in our profit-sharing one. It wasn't going anywhere so we thought maybe they would be a little more interested in the IAM pension fund." Garber further testified that the Union arrived at the $3 an hour figure by estimating the value of the benefit to the average represented employee of the profit-sharing plan during the period of the 1997–2001 contract. Musial asked several questions about the IAM pension plan and asked that the Union furnish him a copy of the plan. (The Union agreed to do so, but never did.)

During a March 16 bargaining session, the Union proposed to drop its proposal for the IAM pension plan if the Respondent would guarantee profit-sharing for the duration of the 2001 contract. Musial rejected the Union's proposal by stating that neither the IAM pension plan, nor profit-sharing, nor a Section 401(k) plan would be part of any proposal that the Respondent would ever be making during the negotiations.

During a March 22 bargaining session, the Union resubmitted its proposal of February 22, except that it dropped the requested amount of contributions to the IAM pension plan from $3 per hour to $2.50 per hour. Profit-sharing was omitted from this union proposal also. When that proposal was not accepted, Garber stated that the Union would drop its proposal for the IAM pension plan if the Respondent would guarantee the profit-sharing plan for the duration of the 2001 contract. Musial again stated that profit-sharing would not be contained in any of the Respondent's proposals.

On March 23, the Union conducted a ratification meeting on a complete contract proposal that the Respondent had offered; that proposal did not include profit-sharing. The offer was unanimously (217–0) rejected. On cross-examination, Garber acknowledged that profit-sharing was discussed at the ratification meeting and that the failure of the Respondent to guarantee profit-sharing was at least part of the reason for the rejection.

[14] Garber was asked, and he testified:

Q. You knew that a meeting had been held with the salaried employees to explain the changes, correct?

A. Yes.

Q. And that the company had changed the salaried employees' formula on the profit-sharing plan, correct?

A. I heard they had changed it, yes.

Q. To Company-wide earnings, correct?

A. Yes.

Q. And the EVA?

A. Yes.

EVA (Economic Value Added) is an aspect of the revised non-represented employees' profit-sharing program that is also based on the profits of all subsidiaries of the Manitowoc Company. The Manitowoc Company's board of directors initially considered implementing EVA for the represented employees of the Respondent, Manitowoc Cranes, and Bay Ship, but it later abandoned the idea.

[15] The General Counsel, rather than asking his witnesses if events *had* happened, asked only if they could *recall* if the events had happened. Negative answers to such questions, of course, were less than denials.

Garber further conceded that the members knew that "there was a possibility" that rates in the profit-sharing plan could be cut. Garber added: "They didn't know when the Company planned on doing this. Or if they would."

During a July 12 bargaining session, the Union resubmitted its proposal of February 8 that: "The Company will agree to guarantee the current profit-sharing plan for the length of this agreement. The Company shall also match the first 3 percent of any union employee's 401(k) contribution." Musial testified that he responded that the Respondent intended to keep profit-sharing as a matter of its discretion throughout the 2001 contract's period.

During a July 31 bargaining session, the parties again addressed the Union's proposal of a guarantee of profit-sharing. Garber was asked, and he testified:

> Q. What, if any, discussions were there between the company and the union regarding this proposal?
>
> A. The company again stated that it was not negotiable.
>
> Q. And what, if anything, did the Union say in response?
>
> A. And the Union through Russ Krings said that it was a negotiated [sic] item.
>
> Q. What, if anything, did you say?
>
> A. In fact I may have even said that I was the one who felt that it is a negotiated [sic] item.

Again, the General Counsel did not ask Krings, the Union's chief negotiator, to testify about this heavily disputed factual issue. I strongly suspect that Garber knew that Krings would not be asked, and I strongly suspect that Garber's shifting to the testimony that it was he who made the statement that profit-sharing was negotiable (or "a negotiated item") was an attempt to cover for the obvious vacuity in the General Counsel's presentation, the failure to ask the chief negotiator what had happened. Moreover, Garber was not an inarticulate individual; his tripping and using "a negotiated item," rather than testifying that he (or Krings) said that profit-sharing was "a negotiable item" was, at least to this finder-of-fact, an apparent mental by-product of mendacity. Again, Musial and Cayemburg testified that the Union never expressly claimed that profit-sharing was a negotiable item, and I credit that testimony.

During an August 1 bargaining session, the Union submitted a 7-page proposal for modifications of the 1997 contract. The proposal included neither profit-sharing, nor an employer match for the employee contributions to the Section 401(k) accounts, nor the IAM pension plan. Garber acknowledged that the proposal was a "package" proposal, and he did not deny that it was intended as a complete proposal for the 2001 contract, but he could not explain why profit-sharing was not mentioned, except to say that it was "an oversight." Musial testified that the Union, at some point during this meeting, orally offered again to drop its proposal for the IAM pension plan if the Respondent would agree to guarantee the profit-sharing plan. Musial did not testify what he replied, and the Respondent's notes do not indicate a reply, but Musial undoubtedly replied again that profit-sharing and the IAM pension plan would not be part of any of the Respondent's proposals.

During an August 14 bargaining session, the Union submitted a written proposal that it would drop its proposal for a 3 percent Section 401(k) match if "profit-sharing stays as it is or we have [the] option to go to IAM pension plan." Musial repeated the Respondent's position that neither profit-sharing, nor the Section 401(k) plan, nor the IAM pension plan would be in any contract that the Respondent signed. The parties went on to other issues that remained between them.

During the early morning hours of August 15, the parties reached complete agreement that included no reference to profit-sharing, the IAM pension plan or employer contributions to the Section 401(k) accounts. Garber testified that during the session the Union withdrew its proposal on profit-sharing (and some other issues between the parties, such as vacations) because:

> We had to make a choice or an evaluation of the importance of the issues left and which way we wanted to go, and we decided that the drug testing and the 401(k) and the union office and the profit-sharing language were not that important because—in particular the profit-sharing because the Company had never said they were going to change our profit-sharing plan. There was no proposal to do so. We were always getting the 15 percent so we had decided to just take it off the table.

The 2001 contract went into effect, retroactive to August 1, with no reference to profit-sharing. It does, however, contain the following management rights clause: "Unless specifically covered by this Agreement, the conduct of all other phases of the Company's operation is reserved exclusively in the Company." The contract also contains the following zipper clause: "This Agreement represents the entire agreement between the Company and the Union. It replaces all previous agreements[,] either written or verbal, and represents the conclusion of collective bargaining."

3. The 2002 alleged unilateral action

On February 12, 2002, the Respondent posted on each of its employee bulletin boards copies of a two-page notice that is required by the IRS when an employer intends to change a tax-exempt benefit plan. The notice states that on February 22, the Manitowoc Company was going to apply for "advance determination on the qualification of . . . Manitowoc Ice, Inc., Hourly Paid Employees' Deferred Profit-sharing Plan." The notice states that "interested parties" have the right, individually or collectively, to submit to the IRS "your comments as to whether this plan meets the qualification requirements of the Internal Revenue Code." On brief, page 23, the Respondent states: "The IRS Notice advised employees that changes had been made to the union employee profit-sharing plan and that The Manitowoc Company was seeking approval of those amendments from the IRS." This statement is false. The notice does not recite that any changes "had been made," or were going to be made, to the plan,[16] and, most important, it does not

[16] Similarly false is the Respondent's statement on brief, p. 79, that "IAM grievance committee members at [Manitowoc] Cranes advised Krings of the notice and informed him that changes had been made to

recite that those changes would have to do with using the earnings of all of the Manitowoc Company's subsidiaries, worldwide, rather than just the Respondent's earnings, as a basis for calculating the profit-sharing benefit.

The Respondent introduced evidence to prove, and I find, that on February 13, it caused to be placed in the mail, certified with return receipts requested, properly addressed to each of the 10 unions that represent employees at the Respondent, Manitowoc Cranes and Bay Ship, a letter stating:

> On February 22, 2002, an application will be filed with the Internal Revenue Service for a favorable determination letter confirming the tax-exempt status of [the full name of the plan that covered the employees who were represented by the addressee was inserted here]. A copy of the Notice to Interested Parties that is required by the IRS is to be posted at the work sites of the employees eligible to participate in the Plan is enclosed for your information.
>
> A new favorable determination letter is regularly requested after the Plan has been amended. The most recent previous application for a favorable determination letter was filed in 1994, after the Plan was amended to comply with all of the changes required by the Tax Reform Act of 1986, and the letter was issued in April 1995.
>
> The changes made since the effective date of the last determination letter include technical and boilerplate language changes required by statutes enacted since the prior determination letter, updating Plan administrative provisions to be consistent with current record-keeping procedures, using Company-wide earnings and sales as the basis for determining yearly profit-sharing contributions, and allocating employer contributions only on the basis of compensation instead of compensation and years of service. The following legislation required changes to technical provisions of the Plan: [six statutes listed].

Each letter was signed by Musial as representative of the Manitowoc Company. The 10 (certified, return receipt requested) letters were placed in the mail, one each for the business agent of each represented bargaining unit at the Respondent, Manitowoc Cranes and Bay Ship, except that 2 of the 10 letters were addressed to Krings, one as business agent for the Respondent's 2 units (again, the production workers' unit and the maintenance mechanics' unit) and one as representative of certain production and maintenance employees at Manitowoc Cranes.[17] Krings, however, denied receiving either of the 2 letters, and the Respondent was unable to produce for either letter a receipt that had been signed by Krings or anyone else from the Union.

The Respondent adduced testimony that the Post Office utilizes procedures that should virtually guarantee receipt when a properly addressed letter is certified and return receipt is requested. The Respondent had no evidence, however, that Krings (or anyone else from the Union) actually received the February 13 letters that were addressed to him. As well, Krings was credible in his testimony that he did not receive them, and I do credit his testimony.[18]

On July 22, 2002, the "Retirement Plan Committee" of the Manitowoc Company sent to each of the Respondent's represented employees a letter enclosing a copy of "an updated Summary Plan Description for your Profit-sharing Plan." The letter contained an essential repetition of the third paragraph of the February 13 letter to the business agents, which letter is quoted above. The summary plan description which was included with the letters to the employees recited:

> The Manitowoc Company, Inc., sponsors the Plan. Subsidiary corporations of The Manitowoc Company, Inc., are participating employees in the Plan. The Plan is also maintained pursuant to the collective bargaining agreement between the Company and the following union: International Association of Machinists and Aerospace Workers, Clipper City Lodge No. 516.

(The Respondent offered testimony that this paragraph was required to be in the summary plan description by IRS regulations, even though it is not literally true because profit-sharing has never been mentioned in a collective-bargaining agreement between it and the Union. The General Counsel does not take issue with that position. I quote the paragraph here only because a witness of the General Counsel claims that he mentioned it to a supervisor when information was being requested, as discussed below.)

Garber and Dworak, being current employees of the Respondent and participants in the profit-sharing plan, received copies of the July 22 letter. The General Counsel concedes that the receipts by Garber and Dworak constitute notices to the Union that the basis of employer contributions to the profit-sharing plan had been changed to "Company-wide earnings." The General Counsel claims, however, that the receipt of the July 22 letter was the first time that the Union (through the employees such as Garber and Dworak or otherwise) received notice that there had been such a change.

4. The alleged delay in furnishing information

All of the Union's requests for information about the changes in the profit-sharing plan were made orally in the form of questions that were placed to the Respondent's supervisors. Dworak testified that after he received his copy of the Manitowoc Company's July 22 letter and the summary plan descrip-

the profit-sharing plan." Krings flatly denied that such happened, and the Respondent introduced no evidence to the contrary.

[17] On brief, p. 25, the Respondent states that at a grievance meeting at Manitowoc Cranes on February 14, Musial advised Krings and other union representatives present that the Manitowoc Company was seeking "IRS approval of recent amendments" to the profit-sharing plans, and that Musial specifically told Krings that he would be getting 2 letters advising him "of the change" in the profit-sharing plan because Krings represented employees at both the Respondent and Manitowoc Cranes. These statements are false. Musial testified to no more than that he advised those present that some letters were being sent "because we were going through this determination." Musial did not testify that he told persons present that changes to the profit-sharing plans had been made, and Musial did not testify that he explained what kind of "determination" the Respondent was "going through."

[18] My credibility resolution is fortified by the testimony of the Respondent's witness Jeffrey John Queen, window manager of the Milwaukee post office, who estimated that the odds of a letter having been delivered, even though a requested return receipt was not completed and returned to the sender, are "one out of 20,000."

tion, he took them to the plant. He approached Dan Brandl, the Respondent's manager of production, with the documents and:

> I says, "You know, we just finished negotiations last year, and in this thing here, it says that the profit-sharing plan is maintained pursuant to the labor agreement between [the Respondent and] the International Association of Machinists."
>
> And I says, "What does that mean? . . . [W]e were told straight out it was non-negotiable; how can this [be]?
>
> The other question I had for Dan [was], "Dan, explain to me what 'Company-wide' is."
>
> And Dan said, "I'm not familiar with what this is." . . .
>
> [A]nd Dan says, "Well, I'm going to be out of town for a couple weeks. . . . I'll try and get in touch with Tom Musial from corporate."
>
> And he says, "I'll try and get you some answers."

Dworak testified that Brandl never got back to him on the matter. Brandl did not testify.[19]

On August 7, 2002, Garber and Harold Olson (another member of the Union's bargaining and shop committee) filed Grievance No. 656 (the August 7 grievance). In a space for "Nature of Grievance," Garber and Olson entered "Changing the profit-sharing from base of Manitowoc Ice, Inc. to Company-wide." In a space for "Settlement Requested" (which has a boilerplate entry of "Make employee(s) whole for all losses incurred"), Garber and Olson entered "Keep profit-sharing the same and negotiate any changes." In a space for the name of the employee who was filing the grievance, Garber and Olson entered "All Union employees." The Union's grievance committee met with first-level supervisor Ellen Dietrich on August 15. Garber testified that the shop committee asked Dietrich whether the profit-sharing plan had been changed; Dietrich said that she had no idea. The committee asked if there had been any changes in vesting rules (years of participation required for vesting levels to be reached). Dietrich replied that she did not know. Garber testified that, to both questions, "she told us she was going to get us an answer back as soon as she talked to her superiors." On September 10, Dietrich answered:

> The Union contends that profit-sharing is a negotiated item and that profit-sharing should be kept within each separate division rather than shared by all divisions.
>
> Grievance 656 is denied; profit-sharing is not a negotiated item. There is no violation by the Company within the Collective Bargaining Agreement.

Dietrich did not testify.

On September 25, the Union met with Cayemburg (again, the Respondent's manufacturing superintendent) in a second-step grievance meeting. Garber testified that he asked Cayemburg if the profit-sharing plan had changed. Cayemburg replied that he did not know. Garber told Cayemburg that Brandl had told Dworak that Musial would be getting answers to him. Cayemburg responded that he did not know anything about that. Olson asked Cayemburg "if any of the vesting had changed for the profit-sharing or if anything else had changed other than that." Cayemburg replied that he did not know. Cayemburg, further according to Garber, replied that he would get answers to the Union "as soon as possible." Cayemburg testified, but he did not deny this testimony by Garber.

Later on September 25 Cayemburg returned the grievance stating:

> The substance of grievance #656 is the changing of the profit-sharing calculation, changing it from the base of Manitowoc Ice, Inc., to a Company-wide base.
>
> —The Union would like to know who made the decision.
>
> —The Union's position is that retirement benefits are a negotiated item.
>
> —The Union would also like to know what the new information exactly means.
>
> As settlement, the Union would like to keep the profit-sharing calculation the same as it was, and to negotiate any future changes.
>
> [Answer:] There is no violation of the collective-bargaining agreement; the grievance is denied.

On October 3, the Union formally requested a third-step meeting on the August 7 grievance. A third-step grievance meeting had previously been scheduled for October 4. At least through June 2002, the Respondent's third-step representative had been Musial. One James Mutsch, rather than Musial, however, appeared for the Respondent at the October 4 meeting. Mutsch did not testify. Musial testified that Mutsch had been hired in July 2002 as "Domestic Director of Human Relations." Musial further testified that, upon being hired, Mutsch became the Respondent's representative at third-step meetings. Musial further testified that he (Musial) did not appear at third-step meetings after Mutsch was hired. (If Musial ever communicated to the Union that he would not be appearing at third-step grievance meetings after July, he did not so testify.)

There was no preset agenda for the October 4 grievance meeting, but Dworak brought up the August 7 grievance late in that meeting by stating to Mutsch, "Jim, I know we don't discuss grievances when they are in the procedures, but what's with the profit-sharing and [Grievance No.] 656?"[20] Mutsch replied that he did not know what Dworak was talking about. Dworak testified that he referred to the July 22 letter from the Manitowoc Company's profit-sharing committee and stated that he had some questions. Dworak asked Mutsch how the summary plan description that was enclosed with the letter could say that the profit-sharing plan was maintained pursuant to a collective-bargaining agreement with the Union when

[19] On brief, p. 29, the Respondent states: "Brandl informed Dworak that because the profit-sharing plan was completely controlled by corporate, he should contract Musial with any questions. (Tr. 189)." At p. 82, the Respondent also states: "Brandl clearly directed Dworak to contact Tom Musial with any questions he or the Union may have regarding the profit-sharing plan." As the quotation of Dworak's testimony demonstrates, these statements are false.

[20] I agree with the Respondent that, despite testimony by Dworak that he was surprised that the August 7 grievance had not been mentioned earlier during the October 4 meeting, this quotation shows that he had not really expected it to be discussed on that date. This is another example of why I discredit Dworak (as well as Garber) in conflicts with the Respondent's witnesses.

"during negotiations we were told this is non-negotiable." Mutsch replied that he did not know and asked what other questions Dworak had. Dworak asked "what changed in this whole thing?" Mutsch replied that he did not know. The parties adjourned, Dworak further testified, with the understanding that the August 7 grievance would be discussed at a later meeting.

On October 31, Garber sent a letter to the Respondent's human resources department requesting "copies of all Plan documents and any other Plan information that is relevant to the profit-sharing plan for the Union Employees at Manitowoc Ice, Inc."

On November 1, the parties conducted another third-step meeting. Dworak testified that he asked again about the August 7 grievance and Mutsch replied, "I'm not prepared to discuss this grievance at [this] time. Tom [Musial] will discuss it with the committee at a later time." Also, Garber testified that Mutsch stated to the Union's committee that Musial was not there because he "couldn't make it."

By letter dated December 3, Mutsch stated to the Union: "Enclosed are the requested plan documents relevant to the Deferred Profit-Sharing Plan for the hourly-paid employees at Manitowoc Ice, Inc. If you require any further information please call me at [telephone number]."

By letter dated December 11, Mutsch responded to the August 7 grievance by stating: "Grievance denied. The grievance was not filed in a timely manner. There was no violation of the collective bargaining agreement." (The 2001 contract has a 7-day limit for the filing of grievances.)

By letter dated December 12, Krings informed Mutsch that the Union took the position that the grievance was timely filed and that the Union was requesting a third-step meeting on it. Krings further testified that he also called Mutsch to ask for a third-step meeting and that "we had a meeting set up."

On January 10, 2003, Mutsch met with the Union's grievance committee. Krings testified that the committee asked Mutsch where Musial was and that Mutsch replied that "he couldn't make it." Dworak testified that Mutsch started the discussions by saying that he was then prepared to write down the questions that the Union had about the August 7 grievance and profit-sharing. Dworak expressed exasperation that Mutsch was there only to write down the questions and not to give answers, but he asked the following questions: (1) What had changed in the profit-sharing plan? (2) Why had the Respondent not held an informational meeting for the employees to explain the changes that had been made? (3) Did the vesting periods change? (4) What does the term "Company-wide" mean as it is used in the Manitowoc Company's July 22 letter to the represented employees? And (5), did the plan for the other divisions of the Manitowoc Company, "particularly Manitowoc Cranes," change? Dworak further testified that: "At the end of the meeting he [Mutsch] said Mr. Musial would get back to us with the answers."

Musial did not contact the Union, but on February 7, Mutsch again met with the Union's grievance committee. At that time Mutsch orally gave answers to the Union's questions about the August 7 grievance and the profit-sharing plan. The only evidence of what those answers were is contained in the following examination of Garber by the General Counsel:

> Q. And what was Mr. Mutsch's response to the Union's question whether the plan had changed?
>
> A. He said yes, it had changed.
>
> Q. Okay. And what was Mr. Mutsch's response to the question of whether or not it applied to other divisions?
>
> A. He said yes, it did and particularly [to] Manitowoc Crane.
>
> Q. What, if anything, did he say concerning the Union's question of whether vesting had changed?
>
> A. He said no, the vesting had not changed.
>
> Q. What, if anything, did he say as to how calculations were going to be done?
>
> A. Oh. He said that the Company-wide earnings . . . meant the whole Manitowoc Company, not just Manitowoc Ice anymore.
>
> Q. Okay. And what, if anything, did he say concerning the Union's question of why this wasn't bargained over?
>
> A. He said it wasn't a bargaining issue on the changes.
>
> Q. And how did the meeting end?
>
> A. We took our answers and that was it then.

The General Counsel does not contest the adequacy of Mutsch's February 7 responses as answers to all outstanding Union questions about the profit-sharing plan. (Again, the General Counsel alleges only a delay in the Respondent's furnishing those responses.)

B. Analysis and Conclusions

The principal allegation of the complaint is that, in violation of Section 8(a)(5), "in July 2002," without prior notice to or bargaining with the Union, the Respondent changed the profit-sharing plan of the employees who are represented by the Union by computing the benefits of the plan on the basis of the Company-wide earnings of the Manitowoc Company, rather than by computing them on the basis of only the Respondent's earnings, as had historically been done. The Respondent admits that it acted without notice to or bargaining with the Union before it implemented the change to the profit-sharing plan. The Respondent defends this action by stating that the Union waived any right to complain about its unilateral action, and, even if the Union did not commit a waiver, the unilateral action has not been made the subject of a valid complaint because the Union did not file a charge about the action within the 6-month limitations period of Section 10(b).

1. The 10(b) defense

In asserting its Section 10(b) defense, the Respondent first points to the uncontested fact that it made the change to the profit-sharing plan on February 22, 2002, not "July 2002" as the complaint alleges. Because the charge was not filed until December 5, over 9 months after its alleged unlawful conduct, the Respondent argues, the action is barred by the 6-months limitations period of Section 10(b). The Respondent does not dispute that the limitations period of Section 10(b) will not be held to have begun to run against a charging party until that party knew, or should have known, of the conduct that is the

subject of the charge.[21] The Respondent nevertheless contends that the complaint is barred because the Charging Party knew of its action within the week after it mailed its February 13 letters to the unions that represent employees at the Respondent, Manitowoc Cranes and Bay Ship. However, because I have found that the Union did not receive the February 13 letter (at any time), and because the Respondent made no other attempt to notify the Union that the profit-sharing plan had been changed, I agree with the General Counsel that the Respondent has not shown that the Union had notice of the alleged unilateral action until it received the Respondent's July 22 letter from the employees.[22] Therefore, I reject the Respondent's position that the December 5, 2002 charge herein was filed outside the 6-month limitations period of Section 10(b) of the Act.

2. The Respondent's unilateral action and the Union's waiver

The law is that an employer is required to bargain about changes in the terms and conditions of employment of union-represented employees unless the union has committed a waiver of its right to bargain about such changes, and such waiver must be in "clear and unmistakable" terms. See *NLRB v. Pepsi Cola Distributing Co.*, 646 F.2d 1173, 1175 (6th Cir. 1981), cert. denied 456 U.S. 936 (1982); *General Electric Co. v. NLRB*, 414 F.2d 918, 923 (4th Cir. 1969), cert. denied 396 U.S. 1005 (1970); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *C & C Plywood Corp.*, 148 NLRB 414, 416 (1964), affd. 385 U.S. 421 (1967). In determining whether the waiver is clear and unmistakable, the contractual language as well as the negotiations surrounding the contract are evaluated. See *Angelus Block Co.*, 250 NLRB 868, 877 (1980); *McDonnell Douglas Corp.*, 224 NLRB 881, 895 (1976). A waiver of such statutory rights is not to be lightly inferred. *Rockwell International Corp.*, 260 NLRB 1346 (1982); *Pepsi-Cola Distributing Co.*, 241 NLRB 869, 870 (1979); *C & C Plywood Corp.*, supra. That is, the law disfavors findings of waivers of bargaining rights, and it will not find a waiver unless the contract language or the conduct of the bargaining representative demonstrates the waiver in clear and unmistakable terms. Or, as stated in *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), before it is found that a union has waived its right to bargain over an issue, "either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." Therefore, the issue in this case is whether the 2001 contract itself, or the negotiations of that contract, or both, demonstrate that the Union waived its right to object to the Respondent's unilateral action of altering the basis for computing the profit-sharing benefits of represented employees. The Respondent, who has the burden of proving a waiver,[23] contends that the waiver is found both in the language of the 2001 contract and in the Union's conduct during the 2001 negotiations. The General Counsel contends that the contract makes no such indication and that the evidence shows that during the 2001 negotiations the matter of profit-sharing was not consciously explored and that the Union did not clearly and unmistakably waive its interest in that matter.

I disagree with the Respondent's position on brief that the absence of reference to the profit-sharing plan in the 2001 contract, of itself, proves that the Union waived any right to object to any unilateral action in regard to that benefit. The Board squarely rejected such an argument in *Press Co.*, 121 NLRB 976 (1958). A union does not risk the peril of employer unilateral actions in regard to a term or condition of employment just because that union is unsuccessful in attempts to secure memorialization of that term or condition in a collective-bargaining agreement. To hold otherwise would stultify bargaining and thwart the purposes of the Act. I further disagree with the Respondent's contention that the zipper clause of the 2001 contract compels the finding of a waiver. In this case, the zipper clause is extremely narrow, covering only "all previous agreements," and it says nothing about matters upon which there was no agreement,[24]such as profit-sharing.[25] And I do not agree with the Respondent's contention that the management rights clause of the 2001 contract gave the Respondent the right to act unilaterally in regard to profit-sharing. That clause literally refers to the Respondent's operations, not to employee benefits.[26] Therefore, I find that there is nothing within (or absent from) the 2001 contract itself that demonstrates that the Union waived its right to object to the unilateral action of the Respondent in regard to profit-sharing.

Whether the Union, by its conduct prior to and during the 2001 negotiations, waived its right to object to the Respondent's 2002 unilateral action in regard to profit-sharing is a far more difficult question.

The determining aspects of the bargaining and bargaining history in this case are: (1) The Respondent had created and implemented the profit-sharing plan without bargaining with the Union. (2) In the many contracts between the parties, the subject of profit-sharing was never mentioned. (3) The Union did not object to the changes that the Respondent made unilaterally to the profit-sharing plan over the years. (4) The Union knew that the Respondent had reduced the profit-sharing benefit of the nonrepresented employees by converting their plan to one that is based on the earnings of all subsidiaries of the Manitowoc Company. (5) Because of this knowledge, and because

[21] See, for example, *Southern California Edison Co.*, 284 NLRB 1205, 1209 (1987).

[22] The burden of establishing notice is on the proponent of the 10(b) defense. *Pennsylvania Energy Corp.*, 274 NLRB 1153, 1155 (1985).

[23] See *Wayne Memorial Hospital Assn.*, 322 NLRB 100 (1996), and cases cited therein.

[24] To argue that the Union's yielding on the issue of profit-sharing, by itself, was an "agreement" on profit-sharing is to reject the principle of *Press Co.*

[25] *Radioear Corp.*, 214 NLRB 362 (1974), as cited by the Respondent, had a zipper clause that included waiver of bargaining rights on issues that had not even been mentioned during negotiations.

[26] See *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985) (management rights clause which states that operation of the business is within the employer's control did not give employer right to unilaterally change health insurance benefits.)

of "nervousness" on the part of the membership (according to Garber) the Union proposed that the Respondent guarantee the continuance of the profit-sharing plan throughout the term of the 2001 contract. (6) The Respondent, throughout the 2001 negotiations, consistently and adamantly refused to agree to guarantee, or even mention, profit-sharing in the 2001 contract. (7) The Respondent based its continued and consistent refusals on the basis that it had created, and changed, the profit-sharing plan for years and that it intended to continue to do so. (8) The Union never contended that profit-sharing was a negotiable item, nor did it threaten to file an unfair labor practice charge if the Respondent changed the profit-sharing plan of the represented employees, even though (a) the Union knew that the Respondent had changed the profit-sharing plan of the nonrepresented employees to those employees' disadvantage, (b) those employees were "not happy" about the changes to their plan, and (c) the represented employees knew that "there was a possibility" (Garber's words) that the rates of their profit-sharing plan could be cut. (9) Instead, the Union proposed the IAM pension plan and increases to the employees' Section 401(k) accounts as replacements for the profit-sharing plan. (10) The Respondent rejected those proposals as well, but the Union nevertheless agreed to the 2001 contract without reference to retirement benefits.

On brief, the Respondent argues that these aspects of the bargaining demonstrate that the Union waived its right to object to the unilateral action, but it cites as authorities only cases in which employer violations, not union waivers, were found. On the other hand, the General Counsel cites several cases for the proposition that the conduct of the Union during the 2001 bargaining did not constitute a waiver, but each of those cases is distinguishable on one or more significant factors.

In *Press Co.*, supra, the language of which the General Counsel quotes at length, the employer unilaterally changed employee sales commissions during a contract term. As noted above, the Board found no waiver of the union's right to object to that unilateral action in the fact that commissions were not mentioned in the contract. The Board further rejected the employer's contention that during bargaining the union waived its right to object to the unilateral action. In so doing, however, the Board noted that during the bargaining the employer had assured the union that it had no intention of changing the commissions, and the union stated that it would file unfair labor practice charges if the employer did so without bargaining. The Board held that, because of these factors, the union did not waive (and could not have waived) its interest in the matter. In this case, however, the Respondent did not mislead the Union into believing that it had no intention of changing the profit-sharing plan. Moreover, the Union did not threaten to file an unfair labor practice charge, and it agreed to the 2001 contract knowing that the Respondent had reduced the profit-sharing plan of the ("not happy") nonrepresented employees by changing the basis of their profit-sharing plan. The Union in this case therefore necessarily had every reasonable expectation that the Respondent and the Manitowoc Company would do to the represented employees what it had done to the nonrepresented employees. That is, unlike the union in *Press Co.*, the Union had not been misled when it signed the 2001 contract.

Other cases that are cited by the General Counsel are also readily distinguishable. In *Bunker Hill Co.*, 208 NLRB 27 (1973), the employer did not defend the complaint on the basis of the union's conduct during bargaining; it defended solely on the basis of a zipper clause. Moreover, in *Bunker Hill* the employer acted unilaterally in regard to wage incentive plans, but the Board stated that: "It should be noted that in the instant case, there is no actual evidence of any 'prior negotiations' concerning incentive wage plans."[27] In this case, however, there were, in fact, negotiations, albeit brief, about profit-sharing. *New York Mirror*, 151 NLRB 834, 841 (1965), does not contain an applicable holding; the Board, in fact, dismissed the complaint, holding that the employer acted unilaterally only because of "pressing economic necessity" and that it would not effectuate the policies of the Act to issue a remedial order, "even if a technical violation were found." And in *Beacon Piece Dyeing and Finishing Co.*, 121 NLRB 953 (1958), employee workloads were not mentioned in the parties' agreement. During the term of that agreement, the employer increased the workloads unilaterally. The Board noted that, during the bargaining that had resulted in the agreement, the employer had refused to discuss the matter, not because it considered workloads to be a management prerogative (as is the case here), but because its competitors did not have workload restrictions in their labor agreements. At 121 NLRB 958, the Board found: "the evidence clearly shows that the respondent, as well as the union, has always considered workload to be a bargainable matter." In this case, the Respondent has never acknowledged that profit-sharing was a negotiable (or "bargainable") issue. Instead, without any union challenge (except for the Union's charge in this case that came over 4 months after it learned of the unilateral action) it has acted unilaterally in regard to the profit-sharing plan.

That the Union had resigned itself to the noncontinuation of profit-sharing was made clear by Garber's testimony about the Union's February 23 proposal. Garber testified that the Union proposed a $3 per hour contribution to the IAM pension plan for each employee because that amount was what the Union had estimated as the benefit to the average represented employee of the profit-sharing plan during the period of the 1997–2001 contract. As the Union proposed the IAM pension plan, it simultaneously dropped its proposal for inclusion of the profit-sharing plan. Therefore, the Union knew, and then accepted, that profit-sharing was not going to be part of the 2001 contract.

Moreover, on March 16 and 22, the Union offered to drop its proposals for the IAM pension plan if the Respondent would guarantee the continuation of the profit-sharing plan. Then on July 12, the Union abandoned its proposal for the IAM pension plan and reproposed the profit-sharing plan and added a proposal for the Respondent to make 3 percent matching contributions to the employees' Section 401(k) accounts. Then on August 1, the Union dropped its profit-sharing proposal and its Section 401(k) plan proposal, and it did not reassert its IAM pension plan proposal. This left the Union with no retirement proposals, an apparent concession that retirement would con-

[27] 208 NLRB at 33.

tinue to go without mention in the parties' contracts.[28] On August 14, acting as if it had not already dropped all of its retirement proposals (including Section 401(k) plan proposals), the Union offered to drop its Section 401(k) plan proposal "if the profit-sharing stays as it is or we have the option to go to the I.A.M. Pension Plan." Then, as the August 14 session went into August 15, the Union again dropped all of its retirement proposals while getting nothing in return.[29] The Union's raising, then dropping, then reraising, then redropping its demand that the Respondent continue the profit-sharing plan as it had previously existed was not indicative of a genuinely held belief that it had a right to object to what the Respondent obviously intended to do with the plan. Rather, the Union's conduct was indicative of an acknowledgment that the Respondent had a right to act unilaterally in regard to the profit-sharing plan.

It is again to be noted that Krings, the business agent of the Union and its chief negotiator, did not testify about the bargaining over profit-sharing. And if the Union nevertheless approved of Garber's and Dworak's attempt to acquire a contractual guarantee of the profit-sharing plan, Krings never opened his mouth to say so during bargaining, even though there was the obvious threat that the Respondent would do to the represented employees what it had done to the nonrepresented employees. It is further to be noted that Krings and the Union did not file charges over the unilateral action in regard to the Manitowoc Cranes employees' profit-sharing plan, even though Krings and the Union represent the production and maintenance employees of Manitowoc Cranes, and even though Manitowoc Cranes and the Manitowoc Company did to the plan of the employees of Manitowoc Cranes exactly what the Respondent and the Manitowoc Company did to the plan of the Respondent's represented employees. (In fact, the Union-represented employees of Manitowoc Cranes were covered by the same profit-sharing plan that covered the represented employees of the Respondent.) The Union's failure to file charges against Manitowoc Cranes speaks volumes. The General Counsel makes no attempt to explain why the Union would not file a charge over the unilateral action by Manitowoc Cranes if it really believed that the plan could not be changed unilaterally.[30]

It appears to me, therefore, that the Union never really held, and did not express during bargaining, a continuing interest in the profit-sharing plan that the Respondent had unilaterally created, sustained, and historically changed. That is, the issue of the profit-sharing plan was fully discussed and consciously explored during bargaining, and during that bargaining the Union consciously yielded to the Respondent's insistence that the profit-sharing plan would continue to be a management prerogative. The Union yielded by its silence when the Respondent claimed that profit-sharing was a management prerogative and by its attempted substitution of the IAM pension plan and increased employer contributions to employees' Section 401(k) accounts for the profit-sharing plan. The Respondent's insistence that the profit-sharing plan would remain a management prerogative was lawful,[31] and the Union acquiesced in that insistence. By that conduct the Union clearly and unmistakably waived its interest in the matter of the profit-sharing plan.[32] Accordingly, I shall recommend dismissal of the allegation that the Respondent unlawfully modified the profit-sharing plan.

3. The alleged unlawful delay in furnishing information

The General Counsel acknowledges that on December 3, 2002, the Respondent furnished the documentary information about the profit-sharing plan that the Union requested in writing on October 31. Specifically, the General Counsel does not contest the timeliness or completeness of that response. The General Counsel does, however, contend that the Respondent unlawfully delayed in answering the questions that the Union orally asked about the changes to the profit-sharing plan after receiving the July 22 letter that the Manitowoc Company had sent to all represented employees. To analyze the General Counsel's position, the first questions of fact are (1) for what pieces of information did the Union ask, and (2) when did the Union ask for each piece. Only after those facts are established is the timeliness of the responses to be examined. The General Counsel's brief assumes that, from July 2002 through January 2003, the Union asked the same questions, but such is not the case.[33]

Shortly after the July 22 letter was issued, Dworak asked Brandl (1) how the summary plan description that accompanied the letter could say that the profit-sharing plan was maintained pursuant to a collective-bargaining agreement with the Union, and (2) what did the letter mean where it said that Company-wide earnings would be used to figure contributions to the profit-sharing plan. Brandl replied that he did not know the answers to those questions, but he told Dworak that he (Brandl) would find out from Musial and return with answers. Neither Brandl nor Musial returned with answers.

[28] Garber's testimony that the Union's failure to include any suggestion of retirement benefits in its August 1 proposal was "an oversight" was absolutely incredible.

[29] The General Counsel's argument that the Union dropped its position on the profit-sharing plan in exchange for other concessions is without foundation. The Union did get other concessions, but there is no evidence that those concessions were given in exchange for the Union's dropping its proposal on profit-sharing (or anything else).

[30] As discussed below, the Union knew of the changes to the profit-sharing plan of the employees of Manitowoc Cranes by January 10, 2003, if not before.

[31] The General Counsel does not contend that it was unlawful for the Respondent's to insist during the 2001 negotiations that the profit-sharing plan was not negotiable. Also compare *Proctor Mfg. Corp.*, 131 NLRB 1166, 1168 (1961), in which the Board found a violation where the employer made unilateral changes in work quotas and piecework rates, in part, because that employer "did not expressly claim during the negotiations that the matter of establishing work quotas and piecework rates was within its management prerogative."

[32] See *Speidel Corp.*, 120 NLRB 733, 740 (1958), which dismissed an allegation that unilateral actions on bonuses violated Section 8(a)(5) because the employer had rejected a maintenance of benefits proposal thereby "reiterating in effect its previous position in substance that bonuses were a subject of 'management prerogative,' and the union by its complete silence acquiesced in this position."

[33] At brief, p. 58, the General Counsel's listing of the Union's January 10, 2003 questions is inaccurate, as is his statement that they were "the same questions it [the Union] had been asking for months."

On August 7, Garber filed the grievance over the implementation of changes to the profit-sharing plan.[34] The grievance did not request information, but it did allege that the Respondent had violated the 2001 contract by: "Changing the profit-sharing from the base of Manitowoc Ice, Inc. to Company-wide."

At the first-step grievance meeting on August 15, Garber asked Dietrich (1) what changes had been made to the profit-sharing plan, and, specifically, (2) had the vesting requirements changed. Although Dietrich did not answer those questions, she did recite in her first-step answer that "The Union contends that profit-sharing is a negotiated item and that profit-sharing should be kept within each separate division rather than shared by all divisions."

At the second-step grievance meeting on September 25, the Union asked Cayemburg the same questions that it had asked Dietrich. Cayemburg replied that he would get answers, but Cayemburg did not do anything except deny the grievance and recite that the Union wanted to know who had made the decision about "changing of the profit-sharing calculation, changing it from the base of Manitowoc Ice, Inc., to a Company-wide base."

At the October 4 third-step meeting, the Union asked Mutsch (1) what had changed about the profit-sharing plan and (2) how the summary plan description could say that the plan was maintained pursuant to a collective-bargaining agreement with the Union. Mutsch replied that he did not know the answer to either question.

At the January 10 meeting, the Union repeated the first question of October 4, omitted the second question of that date, repeated the previous question about the meaning of "Company-wide" in the July 22 letter, repeated the previous question about vesting, and added two more questions: (1) why had not the Respondent held informational meetings about the plan changes, and (2) did the profit-sharing plan for the other divisions of the Manitowoc Company, "particularly Manitowoc Cranes" change. Again, Mutsch gave no answers.

At the February 7 meeting, according to Garber, Mutsch told the Union only that the plan had, in fact, changed, that the changes applied to Manitowoc Cranes and all other subsidiaries of the Manitowoc Company, that the vesting requirements had not changed and that "Company-wide" earnings meant the earnings of all subsidiaries of the Manitowoc Company. Garber did not testify that Mutsch replied to the question about why informational meetings had not been held. (The General Counsel did not ask Garber what Mutsch replied to the question about why informational meetings were not held. Instead, as quoted above, the General Counsel asked Garber only what Mutsch replied to a question of why the Respondent had not bargained about profit-sharing. Garber had not testified that the Union had asked that question, but Garber then responded to the General Counsel that Mutsch had said that the Respondent did not bargain about changes to the profit-sharing plan because profit-sharing was not a negotiable issue, which was no more than what the Respondent had contended throughout the 2001 bargaining.)

Although Mutsch's February 7 answers were extremely cryptic, the General Counsel does not question their adequacy; the General Counsel questions only the lapse of time involved in getting those answers to the Union. In so doing, the General Counsel treats all questions as having been asked since July 2002, and the General Counsel further assumes that the Union had none of the information when the questions were asked. Neither assumption is well founded.

The first question that Dworak asked Brandl in July was how the July 22 letter to employees could enclose a summary plan description of the profit-sharing plan that indicated that the profit-sharing plan was maintained pursuant to a collective-bargaining agreement with the Union when the Respondent had refused to bargain about the profit-sharing plan during the 2001 negotiations. The General Counsel does not suggest how the answer to this question could help the Union process grievances, or bargain, in the future.[35] The General Counsel can make no such suggestion because the "question" was not really a question. It was, at most, a rhetorical question, an argumentative statement that was only in the form of a question. The Union was, in effect, arguing that the Respondent was admitting by the statement in the summary plan description that profit-sharing was a negotiable issue. The Respondent had no duty to respond to such a rhetorical question.

The second question that Dworak asked Brandl in July was what "Company-wide" earnings meant as used in the July 22 letter. Brandl did not reply (except to say that Musial would be in touch), but the Union knew early in the process that "Company-wide" earnings meant the earnings of all of the subsidiaries of the Manitowoc Company, not just the earnings of Manitowoc Ice, Inc., as had been the case in the past. The July 22 letter, itself, which the General Counsel accepts as notice to the Union of the changes in the profit-sharing plan, was sent by the "Retirement Plan Committee" of the Manitowoc Company, not a committee of the Respondent. The letter gave notice that profit-sharing would be calculated by "using Company-wide earnings and sales as the basis for determining yearly profit-sharing contributions." The statement was not limited to any one subsidiary of the Manitowoc Company; it plainly included all subsidiaries, as any objective reading would have disclosed. The August 7 grievance, itself, shows that the Union knew at all times since July 22 what "Company-wide" earnings meant because that grievance complains of: "Changing the profit-sharing from the base of Manitowoc Ice, Inc. to Company-wide." The employment of this phraseology demonstrates that the Union already knew that "Company-wide" and "Manitowoc

[34] The Respondent contends that the August 7 grievance was filed and processed only on behalf of the production workers' unit, not the maintenance mechanics' unit. In his testimony, Dworak placed Paul Krejcarek, as representative of the maintenance mechanics' unit, at the February 7 meeting. Garber, however, testified that no representative of the maintenance mechanics' unit was present at any of the meetings on the August 7 grievance. Garber would not have so testified if Krejcarek had been present at the February 7 meeting. I credit Garber. Nevertheless, the grievance was filed on behalf of "[a]ll Union employees," and this would include the employees in the maintenance mechanics' unit, as well as those in the production workers' unit.

[35] No more negotiations were expected until 2005, when the 2001 contract would approach expiration.

Ice, Inc." were two different frames of reference. Additionally, Dietrich's September 10 first-step grievance answer stated that the Union was contending that "profit-sharing should be kept within each separate division rather than shared by all divisions," and Cayemburg's September 25 second-step answer included the statement that the Union was alleging that the Respondent had violated the 2001 contract by "changing of the profit-sharing calculation, changing it from the base of Manitowoc Ice, Inc., to a Company-wide base." Therefore, even if the Union could not comprehend the plain meaning of the July 22 letter, and even if the Union did not actually make the contentions that Dietrich and Cayemburg recite in their answers, they knew well enough what "Company-wide" earnings meant after they received those answers. That is, from shortly after July 22, and throughout the process, the Union knew perfectly well what "Company-wide" earnings meant, and it could not have been prejudiced by Mutsch's not repeating what that term meant until February 7.

On August 15, September 25, October 4, and January 10, the Union asked how the profit-sharing plan had changed. The Union received the answers when, on December 3, the Respondent complied with Garber's October 31 written request for all documents relating to the plan. The General Counsel makes no argument of how the Union was prejudiced by receiving the answers in this form, especially since Mutsch expressly offered to supply any additional information about the supplied materials upon request. Moreover, the General Counsel makes no argument that the Respondent's February 7 answer to the question of what had changed is inadequate. That answer, according to Garber, was no more than that "it had changed." The Union, of course, knew that the profit-sharing plan had changed; that is why the Union filed the August 7 grievance in the first place. If this answer was satisfactory on February 7, it would have been a satisfactory answer when the Union asked it earlier.

The question about whether the vesting requirements had changed was first asked in the September 25 second-step grievance meeting. This question, as well, was answered in the Respondent's December 3 submission. (The vesting provisions of the 1997 summary plan description were the same as those of the 2002 summary plan description.) Again, the General Counsel makes no suggestion of how the Union could have been prejudiced by the lapse between September and December 3 (again, especially since Mutsch offered to explain anything in the documents). And, again, the Union was not prejudiced by Mutsch's not repeating the answer until February 7.

On January 10, the Union added the questions of why no informational meetings about the profit-sharing plan changes had been held and whether the plans of other divisions, particularly Manitowoc Cranes, had changed. The General Counsel did not ask Garber what Mutsch responded to the question about the informational meetings, probably because the General Counsel recognized that the question was no more than another statement in rhetorical-question form. It was designed only to state that the Respondent had not acted consistently because it had provided informational meetings for the nonrepresented employees before their plan was changed, something that the Union already knew and could easily prove during any subsequent grievance proceedings. Again, the Respondent is not required to reply to rhetorical devices merely because they are advanced in the form of questions.

On February 7, Mutsch did tell the Union for the first time that the profit-sharing plans for other subsidiaries of the Manitowoc Company changed, including that of Manitowoc Cranes. Of course, that question had not been asked until January 10, and the General Counsel has shown no prejudice to the Union by the 1-month time lapse. Moreover, since Krings represented some of the employees at Manitowoc Cranes, he undoubtedly knew well before that time (probably immediately after the July 22 letters were issued to the Respondent's employees) that the profit-sharing plan of the Manitowoc Cranes employees had also changed. At any rate, the information about what had happened to the other units was not presumptively relevant,[36] and the General Counsel has made no showing of relevance in this case. (In fact, the General Counsel is in the position of contending that what happened elsewhere is not relevant, as shown by his failure to explain why the Union did not object to the changes that were made to the profit-sharing plan of the employees whom the Union represented at Manitowoc Cranes.)

I do not accept the Respondent's defenses that there is no violation because the Union never placed its requests for information in writing[37] or that the Union should have addressed its requests to Musial rather than to subordinate supervisors.[38] Nevertheless, I cannot agree with the conclusion of the General Counsel's brief on the information issue (at p. 62):

> Respondent's delay in getting the Union answers to its questions about the changes to the profit-sharing plan meant that the Union could not represent its members or ensure compliance with the collective bargaining agreement or the Act. Additionally, the failure to timely provide the requested information made meaningful effects bargaining impossible. As such, the delay constitutes a violation of Respondent's duty to bargain in good faith.

For these arguments, the General Counsel has alluded to no facts that would support the requested conclusion that the Union could have used the information that it requested if it had gotten that information faster, and no such facts are in the record. I would therefore, recommend dismissal of this allegation of the complaint on that basis alone. Moreover, I have found that the Respondent did not have a duty to bargain about the 2002 changes in the profit-sharing plan; therefore, the Respondent had no duty to bargain about the effects of those changes,

[36] See *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (1969), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967).

[37] *Tubari, Ltd.*, 299 NLRB 1223 (1990) ("There is no legal requirement that information requests be in writing, nor that they be repeated.").

[38] See *Arch of West Virginia*, 304 NLRB 1089 (1991) where, at fn. 1, the Board found a violation stating: "The respondent has not shown that it has requested any information not in its possession from its parent corporation and sister subsidiaries and that they have refused to provide the respondent with such additional information." Moreover, as I have indicated above, the Respondent's argument that Mutsch directed the Union to Musial for answers relies on a blatant misrepresentation of the record.

and the General Counsel's argument on that point necessarily fails.

I therefore find and conclude that the Respondent did not violate Section 8(a)(5) by failing until February 7, 2003, to furnish to the Union information that the Union already possessed, or possessed soon after asking, about the profit-sharing plan of the represented employees or by failing to reply to the Union's rhetorical questions about the Respondent's unilateral changes to the Respondent's profit-sharing plan.

Accordingly, I issue the following recommended[39]

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D.C. December 30, 2003

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.